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No. 86-1361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ANDREA REYNOLDS,

Petitioner,

—against—

MARTHA von BULOW, by her next friends Alexander Auersperg and Annie Laurie Auersperg Kneissl,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

In holding that petitioner Andrea Reynolds was not entitled to withhold documents from discovery on the basis of the First Amendment qualified journalist's privilege, the District Court relied on Ms. Reynolds' deposition testimony, her letter to the Court dated August 6, 1986, and other evidence submitted by the parties. After reviewing this evidence, the Second Circuit unanimously adopted the lower court's factual finding that Ms. Reynolds was not "involved actively in the gathering and dissemination of news" and held that Ms. Reynolds had failed to meet her burden of showing that she had the "essential attributes of a journalist."

In view of the factual record of this case the questions sought to be presented by petitioner should be restated:

1. Whether a witness who is not a journalist by trade may be required to make a threshold showing that she is within the class protected by the qualified journalist's privilege before the court will apply the First Amendment balancing test required by the privilege.

2. Whether an intimate friend of a defendant, who has gathered information to aid the defendant in prior proceedings rather than to disseminate it to the public, and who later decides to author a book using that information plus her own memories, is entitled to invoke the First Amendment qualified journalist's privilege to prevent discovery of the manuscript of the book in a civil lawsuit against that defendant.

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Respondent Martha von Bulow, by her next friends, Alexander Auersperg and Annie Laurie Auersperg Kneissl, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Second Circuit's opinion in this case.

OPINIONS BELOW

The lower court opinions issued between October 14, 1986 and February 10, 1987 are listed in the Petition at page 2 and reprinted at Appendix A. On February 20, 1987 petitioner's Motion for a Stay of the Mandate of the Court of Appeals for the Second Circuit was denied by Justice Thurgood Marshall. On February 23, 1987, subsequent to the filing of the Petition, the District Court issued an oral decision from the bench denying petitioner's application for a stay or other relief from the District Court's previous orders, refusing to supplement the record by receiving additional documents from Ms. Reynolds, and directing petitioner to comply with its orders by 5:00 P.M. on February 24, 1987. A transcript of the decision is reprinted in Respondent's Appendix A at 47a.

JURISDICTION

Respondent concurs in the statement of this Court's jurisdiction found at page 2 of the Petition insofar as it applies to petitioner's manuscript. However, since the District Court has given respondent the documents that Ms. Reynolds had submitted *in camera* (her handwritten notes and two investigative reports), the Petition is moot with respect to those documents.

COUNTER-STATEMENT OF THE CASE

This is an action seeking damages and other relief against defendant Claus von Bulow, based on allegations that he twice attempted to murder his wife, Martha von Bulow, and to defraud her. Petitioner Andrea Reynolds, Claus von Bulow's constant companion during the appeal of his conviction for attempted murder and his retrial, is an important witness in this case. Plaintiff subpoenaed her as a non-party witness seeking her testimony and production of relevant documents. Ms. Reynolds refused to pro-

duce three categories of documents: two investigative reports that she commissioned prior to von Bulow's retrial; handwritten notes that she took while watching the retrial; and the manuscript of a book that she is preparing about the von Bulow case.

Since the documents in the first two categories have been turned over to respondent, only the manuscript is still at issue. In a letter to the district court dated August 6, 1986 Ms. Reynolds did not suggest that this manuscript was based on information acquired by her through investigation or research but instead admitted that it "was almost entirely based on material in the public domain" as well as "my memories" and an investigative report (since produced to respondent) she had commissioned for her "own peace of mind." (JA 108).

Procedural History

The subpoena was served on Ms. Reynolds on June 2, 1986. She ignored the subpoena and follow-up letters for two months, until plaintiff moved to have her held in contempt. Ms. Reynolds then responded in a letter to the court dated August 6 and submitted the two investigative reports and her notes for *in camera* review. After respondent submitted a short Memorandum of Law noting that Ms. Reynolds did not claim to have produced any of the documents as a journalist (JA 113), Ms. Reynolds for the first time asserted in oral argument that her documents were protected by a journalist's privilege. The District Court then gave her the opportunity to create a record through deposition testimony to support her claim. (JA 147-177). Ms. Reynolds appeared for her deposition but refused to answer questions about the contents of her manuscript, asserting that the subject of the deposition was to be narrowly limited to her claimed background as a journalist.

After reviewing the deposition and other evidence submitted by the litigants, the District Court ruled on October 14, 1986 that the documents sought were not protected by a journalist's

privilege and ordered Ms. Reynolds to produce them. The District Court also rejected Ms. Reynolds' belated argument that the attorney-client privilege protected the documents. Subsequently, the Court's Confidentiality Order restricting the use of the documents was entered on October 28, 1986 and Ms. Reynolds was held in contempt on November 18, 1986 for her failure to produce the manuscript. Ms. Reynolds appealed from the Contempt Order and the underlying production orders.

On February 10, 1987, the Second Circuit affirmed the orders appealed from in all respects and ordered that its mandate issue ten days from the date of the filing of the opinion, unless Ms. Reynolds obtained a stay of the mandate from the Supreme Court within that time. The Second Circuit subsequently denied Ms. Reynold's application for a stay and for reconsideration. Justice Thurgood Marshall denied Ms. Reynolds application for a stay on February 20, 1987. On February 23, 1987, the Second Circuit's mandate having issued, the District Court turned over to respondent the documents that it had been holding *in camera* and ordered Ms. Reynolds to produce the remaining document, her manuscript, by 5:00 P.M. on February 24, 1987. Ms. Reynolds has not complied with this order and continues to be in contempt of court.

Statement of Essential Facts

The facts set forth in Ms. Reynolds' Petition and Application for Stay of Mandate are selectively chosen, and in significant part consist of statements made by Ms. Reynolds at her deposition that were not credited by the District Court or the Second Circuit. Meanwhile, no mention is made by Ms. Reynolds of various admissions at her deposition and in her papers that were credited by the courts below, and that undercut Ms. Reynolds' claim that she was acting as a journalist. A recitation of the relevant facts is provided in the Second Circuit's

opinion reprinted at Petition 1a-24a. This brief merely notes certain misstatements and omissions in Ms. Reynolds' Petition.

Most notably, Ms. Reynolds inaccurately attempts to portray herself as having been hired by the *New York Post* to cover the criminal trial and states that she "wrote several articles which were found to be suitable for publication." (Pet. 6; *see also* Pet. 11, referring to this as an "undisputed" fact). In fact, a former editor of the *Post*, in a letter written for Ms. Reynolds, simply stated that Ms. Reynolds had provided "samples" of her writing which were good (JA 402-403). Moreover, the Second Circuit, after noting that Ms. Reynolds had stated during her deposition that "negotiations with the *Post* had never come to fruition," (Pet. 7a), endorsed the District Court's finding that Ms. Reynolds was not "engaged in any meaningful way in the gathering and dissemination of news while she attended von Bulow's criminal trial" in 1985. (Pet. 20a).

Ms. Reynolds also states as "uncontradicted facts" that she "had intended to 'write about the von Bulow affair as a reporter' since 1983 and that she had taken notes at the second criminal trial for that purpose." (Pet. 9). However, the only mention on any of the pages cited by Ms. Reynolds of why she took the notes at the trial is an oblique reference to her arrangement with the *New York Post* (JA 158-59). Yet, as the Second Circuit specifically found, she continued to take the notes "even after the negotiations with the *Post* proved to be fruitless." (Pet. 20a). Thus, the District Court found, and the Second Circuit agreed, that the notes she took during the second trial were not related to any journalistic activity. (Pet. 36a, 20a).

Finally, Ms. Reynolds includes in her papers (Pet. 5, n.2) a reference to a "letter agreement with Mr. von Bulow" that is mentioned nowhere in the record, or in the opinions below, and for which no citation to the record is supplied. After the Second Circuit's mandate issued, Ms. Reynolds attempted to supplement the record with four documents, which apparently

included the one referred to in the Petition. (Appendix A at 49a). Judge Walker rejected Ms. Reynolds belated attempt to supplement the record and noted that, in any event, the documents appeared to have "no bearing" on the issue of a journalist's privilege. (Appendix A at 49a). The reference should be ignored.

REASONS TO DENY THE WRIT

This case does not meet any of the criteria for granting certiorari set forth in Rule 17 of the Supreme Court Rules and Ms. Reynolds has not shown any other "special and important reasons" for granting review.

A. The Decision Below Is So Narrowly Fact-based and Limited in Application That It Does Not Raise an Important Question of Federal Law

The dispositive question in this case is whether a defendant's friend who gathers information to help the defendant and who later decides to write a book based on such information and on her personal experiences may then invoke the First Amendment to shield the production of the manuscript of the book in litigation against the defendant. Plaintiff submits that the narrow, fact-specific issue raised by this case need not be considered or addressed by the Supreme Court.

The decisions of the courts below properly focused on the unique facts of this case. Ms. Reynolds indisputably has been privy to much information concerning defendant Claus von Bulow's actions that are relevant to plaintiff's lawsuit, and she has obtained such information not because of her alleged journalistic activities but simply because she has been von Bulow's constant companion. Ms. Reynolds is admittedly not a journalist by trade and the District Court and the Second Circuit noted that even the one magazine article she claimed to have published identified her husband as the author. (Pet. 7a, 35a).

Her manuscript, as noted by the Second Circuit, relying on Ms. Reynolds' own letter to the District Court, "was based on material in the public domain," on Ms. Reynolds' "memories," and on two investigative reports. (Pet. at 20a). These investigative reports have already been turned over to respondent pursuant to the District Court's orders. To the extent that Ms. Reynolds claims to have also used information she obtained from other persons, the Second Circuit, relying on Ms. Reynolds' deposition testimony, found that these persons came to her because of her relationship with von Bulow, and prior to her decision to write a book (Pet. 21a). In short, there has been no showing that any of the information in the manuscript was gathered or otherwise obtained by Ms. Reynolds as part of any effort to disseminate information to the public, whether through a book or through any other form of journalism.

While Ms. Reynolds attempts to portray the Second Circuit's decision below as an attack on First Amendment protections, the Second Circuit in fact did not deny authors of non-fiction books the right to assert a journalist's privilege, nor did it formulate a new test for application of the privilege that will have a chilling effect on such authors or other journalists. Instead, the Second Circuit derived a test to apply to these unique facts based on precedents established by this Court and by the federal Courts of Appeals. The Court recognized a broad journalist's privilege available to any person involved in the gathering and dissemination of news and extending to both confidential and non-confidential sources, as well as resource materials (Pet. 12a). Under this test the claimant of a privilege must merely make a preliminary showing that he gathered or obtained information with the intent to disseminate it to the public. This result creates no threat of "chilling" amateur or professional journalists who engage in bona fide newsgathering or who rely on sources as part of their work for the purpose of disseminating information to the public. It excludes only persons who, like Ms. Reynolds, attempt to shield from discovery their memories of personal experiences and information obtained by virtue of their con-

nection to the case and apart from any newsgathering or other journalistic activity.

Thus, the Second Circuit's interpretation of the scope of the journalist's privilege is a reasonable one and prevents undue expansion of the privilege which would unnecessarily restrict discovery. As this Court has repeatedly admonished in construing limited privileges against disclosure, "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683 (1974), quoted in, *Herbert* v. *Lando*, 441 U.S. 153, 175 (1979).

B. The Second Circuit's Interpretation of the Scope of the Journalist's Privilege Is Consistent with the Decisions of Other Courts of Appeals and of This Court

The Second Circuit's decision is in no way inconsistent with the decisions of the Second Circuit and of other federal Courts of Appeals that are cited by Ms. Reynolds at Petition 13-14.* Those decisions set forth the balancing test to be applied once it has been established that a witness is entitled to the protection of the journalist's privilege. Of the decisions cited, only *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d 433, 436-37 (10th Cir. 1977) addresses the issue of who is entitled to invoke the privilege. The reasoning of the *Silkwood* court was quoted and underscored by the Second Circuit as follows:

> "[The film maker's] mission in this case was to carry out *investigative reporting for use in the preparation of a documentary film*. He is shown to have spent considerable

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* Ms. Reynolds' suggestion at Petition 13 and 18 that the Second Circuit's decision in this case conflicts with prior decisions of the Second Circuit and of the Southern District of New York is incorrect, and in any event irrelevant. An intra-circuit conflict ordinarily is not a basis for granting certiorari. Rule 17(1)(a) of the Rules of the Supreme Court of the United States. *See Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

> time and effort in obtaining facts and information of the subject of this lawsuit, but it cannot be disputed that *his intention*, at least, *was to make use of this in preparation of the film*."

(Pet. 15a; emphasis in Second Circuit opinion). Thus, the Second Circuit's decision below, far from being in conflict with *Silkwood*, follows the Tenth Circuit's approach, including its inquiry into the witness' intent in gathering information.

Nor is the decision below inconsistent with the First Amendment decisions of this Court cited by Ms. Reynolds. Ms. Reynolds cites *Branzburg* v. *Hayes*, 408 U.S. 665 (1972) as recognizing the existence of a journalist's privilege protecting individuals engaged in newsgathering. However, plaintiff does not dispute the existence of such a privilege. Furthermore, the Second Circuit clearly recognized in its opinion below the existence of such a privilege (holding simply that Ms. Reynolds could not use that privilege to avoid discovery in this case).

As for the recent decision in *Philadelphia Newspapers, Inc.* v. *Hepps*, ____ U.S. ____, 106 S.Ct. 1558 (1986), it simply has no application here. In that case, the Court held that the burden of proving falsity in private-figure libel cases against media defendants involving speech of public concern must be borne by the plaintiff since requiring the speaker to prove truth "deters such speech because of the fear that liability will unjustifiably result." In this case, the Second Circuit did not burden speech but followed the familiar rule that a witness invoking a testimonial privilege in order to resist giving evidence bears the burden of establishing his entitlement to the privilege claimed. *See e.g.*, *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980) (burden on witness claiming journalist's privilege to establish need for preserving confidentiality); *Continental Cablevision* v. *Storer Broadcasting*, 583 F. Supp. 427, 435-6 (E.D. Mo. 1984) (burden on witness claiming journalist's privilege to provide court with "particularized allegations or facts" to support claim). *See also In re Grand Jury Subpoena Dtd. January 4, 1984*, 750

F.2d 223, 224 (2d Cir. 1984) (potential scholar's privilege); *Hodges, Grant & Kaufman* v. *U.S. Government*, 768 F.2d 719, 721 (5th Cir. 1985) (attorney-client privilege); 8 Wright & Miller, *Federal Practice and Procedure: Civil* § 2016, p. 126. These decisions are consistent with decisions of this Court. *Cf. United States* v. *Mandujano*, 425 U.S. 564 (1976) (witness invoking Fifth Amendment privilege must satisfy court that claim is not "subterfuge").

The case is also entirely distinguishable from *Herbert* v. *Lando*, 441 U.S. 153 (1979), relied upon by Ms. Reynolds for protection of her alleged "editorial process." The discovery sought in *Lando* was aimed directly at editorial conversations and at conclusions of a journalist in preparing a '60 Minutes' segment in order to prove the conduct and state of mind of the producer in a libel action. *See id.*, at 157 n.2, 171. Here, the manuscript is merely a compilation of unprivileged information obtained by Ms. Reynolds in capacities other than that of a journalist. Moreover, plaintiff is not seeking to inquire into or interfere with Ms. Reynolds' editorial decisions, but instead merely seeks access to the unprivileged information contained in the manuscript. It is difficult to understand how requiring disclosure of this manuscript, particularly under a confidentiality order, would have a chilling effect on the willingness or ability of journalists or other authors to gather material and to disseminate information to the public.

C. The Court Below Fully Considered and Correctly Decided the Issue

Four judges have carefully reviewed Ms. Reynolds' claim of privilege, and none has found any merit whatsoever in it. Ms. Reynolds has simply failed to show how the discovery ordered here will infringe on any First Amendment interests.

A journalist's privilege has been fashioned from the First Amendment's free speech clause to protect the ability of reporters to gather news for dissemination to the public. *See Branzburg* v. *Hayes*, 408 U.S. 665, 693; *id.*, 408 U.S. at 725,

726 (Stewart, J. dissenting) (journalist's privilege to protect his sources "stems from the broad societal interest in a full and free flow of information to the public [which] underlies the Constitution's protection of a free press"); *United States* v. *Cuthberston*, 630 F.2d 139, 147 (3d Cir. 1980) ("public policy favoring the free flow of information to the public" is the foundation for the journalist's privilege), *cert. denied*, 449 U.S. 1126 (1981). The courts below properly held that none of the information at issue here was obtained for the purpose of disseminating information to the public. Accordingly, the policies underlying the journalist's privilege are not implicated by the discovery granted below and application of the privilege would be unwarranted.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: March 19, 1987

Respectfully submitted,

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APPENDIX A

Opinion of the United States District Court, Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

85 Civ. 5553

MARTHA VON BULOW,

Plaintiff,

—v.—

CLAUS VON BULOW,

Defendant.

February 23, 1987
4:10 p.m.

ORAL DECISION

(In open court)

THE COURT: Andrea Reynolds has requested a further conference/hearing before the court today in the wake of developments since the Court of Appeals for the Second Circuit on February 10th, 1987, affirmed in a written opinion the decision of this court holding that Ms. Reynolds was not entitled to a journalist's privilege and would be required to comply with the orders of this court that she turn over the manuscript and other documents as to which she was claiming a privilege.

Stays of the mandate were sought from the Second Circuit Court of Appeals and the United States Supreme Court pending a decision by the Supreme Court on Reynolds' petition for certiorari. Both of those stays were denied. Reynolds now has applied to this court for relief from the orders previously entered by this court and upheld by the Second Circuit Court of Appeals directing compliance with the discovery requests of the plaintiff in this action.

Her claim is that the petition for certiorari will either be mooted if the materials are turned over or, alternatively, that she would have to be in contempt of this court and would suffer the penalties of contempt.

The court denies Reynolds' application for any further stay or relief from the orders of this court concerning the production of the documents in question. The matter has been fully litigated both in this court and the Court of Appeals and a presentation has been made to the Supreme Court for a stay which was denied. Perhaps that is some indication of how the Supreme Court views the petition for certiorari, but that is really not for this court to speculate on. In any event, both the Court of Appeals and Supreme Court have denied a stay of the mandate and this court is not at this point going to alter the state of affairs.

So the third party witness Andrea Reynolds must comply with the orders of this court. And as far as the details of that compliance is concerned, I am going to leave that in abeyance because I want to discuss that with counsel.

I want to briefly turn to the second argument or position that was taken by Andrea Reynolds at this proceeding, and that is that four documents should be received and considered by this court as having some bearing upon the question of whether the journalist privilege should apply in light of the Second Circuit's intent-based inquiry test.

I have reviewed these documents and decline to permit the record to be so supplemented at this late date. First of all, these documents, the court notes, appear to relate to the publication by Von Bulow of a book to be written by him or to the publication of a book about Von Bulow to be written by some third party writer, at least the documents dated 17 April, 1982, and 20 April, 1982, appear to so relate.

Those documents appear to cast Ms. Reynolds in the role of some sort of business intermediary or agent, and hardly bear upon her role as a purported journalist under the Second Circuit test or, for that matter, under any other test that the court can conceive of.

The second two documents, one of which is dated 11 March, 1984, and the other of which is undated, appear to relate to the possibility of a movie being made about the Von Bulow affair in which, again, Andrea Reynolds would possibly be some sort of agent or business associate of Von Bulow's in so arranging. Again, the court sees no bearing on the issue of a journalist's privilege from these documents.

The court's conclusion here is parenthetical because the court declines to permit these documents to supplement the record in any event at this late date. The court's conclusion is buttressed by the fact that Reynolds herself never produced these documents at a time when the question of her being a journalist was precisely at issue at two court appearances before this court or at her deposition.

So it is apparent to this court that, indeed, Ms. Reynolds herself did not consider these documents to have a bearing on the journalist privilege issue. So the court does not see how, even if these documents were admitted, they could assist Ms. Reynolds in any respect.

The court does note, of course, that they were not turned over to the plaintiffs pursuant to their subpoena and were not presented to this court when the court was trying to review with Ms. Reynolds when she was acting pro se the nature of the subpoena that was extant. So the court declines to supplement the record with the four documents presented by counsel but will just mark them as a court exhibit at the present time for purposes of this proceeding.

Now, let me turn now with counsel to the question of compliance here. Mr. Siffert, I think it is time now for Ms. Reynolds to comply, and I am going to, given the fact that you wanted to have the hearing before this court and the efforts that were being made as of last Friday to get a stay from the Supreme Court, I am going to now direct that she comply by close of business tomorrow with the orders of this court, and the penalty of $500 a day will be in effect if she fails to comply.

Of course, the court remains available to plaintiffs in the event of noncompliance to raise the amount of the fine for any such contempt of court. So I would direct that she comply by 5:00 p.m. tomorrow, the 24th of February.

MR. SIFFERT: Just for the record, since we are on the record, I have advised my client that in the event that your Honor denied the stays what the consequences would be of contempt, and as I indicated at the outset, she has told me she would take my advice into consideration, and what she does, I will tell you only that she is going to decide what she decides. I have given her advice, I have made recommendations to her, and I trust that the court understands that I am not the client.

THE COURT: All right.

MR. KLINE: Your Honor, we would like to ask with respect to the other documents that issued, since you are in possession of them and there is no further stay, if it is possible that we could pick them up this afternoon?

THE COURT: Yes.

MR. SIFFERT: With respect to that, I was instructed by my client that if that occurred, to state that if your Honor was going to be turning over the documents that have been held in camera, that Ms. Reynolds' purpose in making sure that they were in camera was to withhold them from plaintiffs, that she does not believe that plaintiffs will respect the confidentiality order. She has instructed me to say this.

Ms. Reynolds has also asked me to request that if the in camera documents are to be produced to the plaintiffs, that the confidentiality order be lifted as to those in camera documents.

THE COURT: She wants the confidentiality order lifted?

MR. SIFFERT: Yes.

THE COURT: Now with respect to those?

MR. SIFFERT: Yes. It is her view. She has instructed me to ask for that.

MR. PARNON: Your Honor, may I speak to that, since Mr. Kline was not involved in the earlier proceedings? What this sounds like is that Ms. Reynolds is considering releasing these documents to the public. We have not seen these documents. As your Honor knows, we were concerned at the early court hearing in August 19th of Ms. Reynolds doing that.

They made the statement to your Honor up at the bench before we started the argument on the record that she had no interest in publicizing these documents and was perfectly willing to abide by your Honor's decision. Your

Honor has decided, and now we hear that she wants to publicize them.

We want very much to oppose any lifting of the confidentiality order. It was made clear on the record that it applied to not just us but Ms. Reynolds.

THE COURT: All right. The confidentiality order will remain in effect, and if she violates that order the court will consider appropriate sanctions for a separate contempt of court.

(Proceedings adjourned)